

STATE OF MICHIGAN
IN THE SUPREME COURT

GERARD J. WIATER,

Plaintiff/Appellee

v.

Supreme Court No. 128139
Court of Appeals No. 250384
Lower Court No. 03-403316 NO

GREAT LAKES RECOVERY
CENTERS, INC.,

Defendant/Appellant

128139

AMICUS CURIAE BRIEF OF MICHIGAN TRIAL LAWYERS ASSOCIATION

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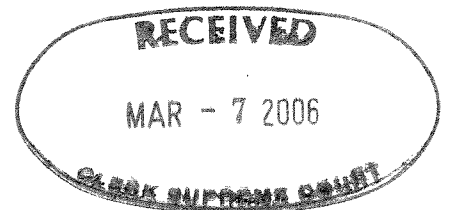


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Fn 1

STATEMENT OF QUESTIONS PRESENTED

- I. Whether the jury should decide if a danger is open and obvious to an ordinary person upon casual inspection, when the proofs, including the existence of special aspects, create a question of fact that the risk of harm was unreasonable.**

Amicus Curiae states: Yes.

The Court of Appeals stated: No.

The Trial Court stated: No.

- II. Whether a possessor of land's failure to undertake measures to diminish the risk of slipping and falling on ice may constitute a special aspect under Lugo v. Ameritech Corp.**

Amicus Curiae states: Yes.

The Court of Appeals stated: Yes.

The Trial Court did not address this question.

- III. Which party should have the burden of proof regarding the existence of special aspects.**

Amicus Curiae states: Yes.

The Court of Appeals did not address this question.

The Trial Court did not address this question.

INTEREST OF AMICUS CURIAE

The Michigan Trial Lawyers Association (MTLA) is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 2,500 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents important issues of law, the resolution of which are important to premises liability jurisprudence in this State, and will have a direct and substantial impact on MTLA members' clients who are victims of unreasonably dangerous conditions of negligently maintained premises.

ARGUMENT

I. Whether The Danger from Slipping and Falling on Ice Is Open and Obvious Should Be a Question of Fact for the Jury When Reasonable Minds Could Differ Regarding the Probability and Magnitude of the Harm.

This Court has requested the parties to address at oral argument whether the “danger was open and obvious”. Amicus Curiae Michigan Trial Lawyers Association takes no position regarding whether the particular danger encountered by the Plaintiff in this case was open and obvious.¹ Amicus Curiae contends that this question cannot and should not be answered based upon the record that has been developed in the lower court because whether it is

¹It should be noted that the witness Lynn LaVictor testified that the area of the parking lot immediately around where the Plaintiff fell was clear ice (Deposition of Mr. LaVictor, p. 35), and that the Plaintiff does not have a memory of the events because of his traumatic brain injury, caused by the fall on Defendant's premises. As such, the Plaintiff would be entitled to the presumption of ordinary care pursuant to M Civ JI 10.09 . A jury could infer from these facts that the condition was not open and obvious upon casual inspection, because the only witness with a memory testified that the ice in the immediate vicinity was clear, based upon his observations after Plaintiff's fall.

reasonable to expect an average person with ordinary intelligence to discover the danger² upon casual inspection is a question for the jury, when the proofs create a question of fact that the risk of harm was unreasonable.

Many Court of Appeals panels dealing with cases involving slips and falls on ice and snow have assumed that the danger was open and obvious on the theory that residents of Michigan are expected to encounter snowy and icy conditions in winter, and that past experience makes them undoubtedly aware of the potential danger of slipping. However, a general knowledge that winter conditions in Michigan may be hazardous cannot be equated **as a matter of law** with a conclusion that the particular condition in question was open and obvious upon casual inspection. This Court has repeatedly held that it is the condition of the premises that must be open and obvious. Bertrand v Alan Ford, 449 Mich 606, 537 NW2d 185 (1995), Perkovich v Delcor Homes, 466 Mich 11, 643 NW2d 212 (2002), Mann v Shusteric Enterprises, 470 Mich 320, 683 NW2d 573 (2004), Lugo v Ameritech, 464 Mich 512, 629 NW2d 384 (2001).

Many Court of Appeals decisions appear to confuse the general condition of a parking lot or area with the condition of the specific area where the person was injured. These cases conclude that because of the invitee's general knowledge of the area, that the victim should have expected that encountering icy patches was possible. The lower courts appear to accept a defendant's statements that ice and snow are common place in Michigan and are open and obvious to everyone, under all circumstances, effectively granting immunity from tort liability for injuries caused by slips and falls on ice and snow.

For the reasons stated below, Amicus Curiae urges the court to make clear that it has

²Please see Section IB below for a discussion of the difference between "danger", "hazard" and "risk".

never held that **as a matter of law** the danger of sustaining an injury from slipping and falling on any ice or snow that one may encounter is readily apparent to an average person upon casual inspection, and to make clear that each case needs to be decided on its own facts.

If it were true that the danger of ice and snow was open and obvious to all, no reasonable person would be expected to ever step on any ice or snow for fear of imminent injury. Yet, reasonable Michiganders do this every winter. Reasonable jurors can certainly conclude based upon the circumstances of individual cases that not all encounters with ice and snow are identical, and that reasonable people do walk on ice or snow without expecting that injury is certain or imminent.

As is discussed below, engineers and biomechanical professionals have shown that the danger encountered varies, depending on the temperature, the topography, the paving material used, the footwear of the person, the roughness of the ice, the force with which one steps on the ice, the weight of the walker, and the stage of the walking cycle that the walker encounters the ice, among other considerations. Moreover, the alleged obviousness of snow or ice does not answer the question of whether it was nevertheless unreasonably dangerous not to undertake measures to diminish the risk, because the invitee could not be expected to protect him or herself against it. The parties should be allowed to develop a full record by presenting any evidence that may bear on the specific circumstances of the particular condition encountered.

Assuming that the danger of every type of ice or snow is open and obvious to all has become a pervasive theme in many Court of Appeals cases that have dealt with this issue, following this Court's decision in Lugo v Ameritech Corp., 464 Mich 512, 629 NW2d 384 (2001). Further, the Court of Appeals regularly pronounces that ice and snow do not pose a high

likelihood of injury, without ever having been presented with statistical or empirical evidence regarding the matter. To sophisticated engineers, biomechanical, human factors and safety professionals, such assumptions are a denial of their life's education, training, and labor.

The courts should not be deciding that there are no genuine disputes that the danger in a particular case was open and obvious upon casual inspection, without the benefit of a full record, including if offered and appropriate, scientific opinion. The jury should be allowed to decide whether a particular danger was open and obvious to a reasonably prudent person after being presented with all the pertinent evidence in a case.

Michigan law has always held that questions of reasonableness are for the jury to decide, and where reasonable minds can differ, it is for the properly instructed jury to determine whether the risk was "open and obvious". In Bertrand v Alan Ford, 449 Mich 606, 537 NW2d 185, (1995), this Court held that "if the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide If the jury determines that the risk of harm was unreasonable, then the scope of the defendant's duty to exercise reasonable care extended to this particular risk". Bertrand, 449 Mich at 617. See also, Hughes v PMG Building, 227 Mich App 1, 11, 574 NW2d 691 (1997); Woodbury v Bruckner (On Remand), 248 Mich App 684, 693-684, 650 NW2d 343 (2001).

This Court cited Bertrand with approval in Lugo, stating:

"Consistent with Bertrand, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in

barring liability.” Lugo, at 517-518

The assumptions that the danger presented by ice and snow are open and obvious as a general rule, and that slipping and falling on ice or snow does not pose a high likelihood of injury appear to have had their genesis in the cases of Joyce v Rubin, 249 Mich App 231, 642 NW2d 360 (2002), and Corey v Davenport, 251 Mich App 1, 649 NW2d 392 (2002). These cases relied on this Court’s dictum in Lugo, regarding an example of a common pothole, where the Court stated:

“Using a common pothole as an example, the condition is open and obvious and, thus, cannot form the basis of liability against a premises possessor. The condition does not involve an especially high likelihood of injury. Indeed, an "ordinarily prudent" person. . . . would typically be able to see the pothole and avoid it. Further, there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury.”

Lugo, 464 Mich at 520.

The Joyce and Corey Court of Appeals panels applied this reasoning to situations involving slips and falls on ice, and concluded as a general proposition that ice and snow are obvious and that falling on them does not pose a high likelihood of severe harm. However, a recognition that winter weather may in general be hazardous is a more appropriate inquiry for determining an invitee’s comparative negligence, and should not be used to determine whether the **particular hazard** presented an open and obvious danger.³ Awareness that snow and ice exist in Michigan in winter is not equal to knowledge that there is ice in a particular place, and is

³This Court has held that the issue of comparative negligence is distinguishable from the issue of whether a danger was objectively open and obvious, and that the two inquiries should not be separate. Lugo v Ameritech, 464 Mich 512, 629 NW2d 384 (2001). In Quinlivan, this Court held that the invitee’s knowledge of the premises conditions should be considered in the context of contributory negligence. Quinlivan 349 Mich at 261.

not equal to knowledge that the friction created by one's footwear will not be sufficient to prevent slipping if the ice is encountered. There is a distinction between awareness of a condition and awareness of the danger presented by that condition, as will be discussed in detail below.⁴

Many cases that have been decided by the Court of Appeals since Joyce and Corey, have held that the invitee cannot prevail, relying on the reasoning of these two cases. However, this Court has never erected an absolute barrier to recovery for injuries sustained on ice-covered premises. Rather, the outcome has always been fact specific, depending on whether the **particular** facts show an "open and obvious" danger or "special aspects". This Court recognized as much in Quinlivan v Great Atlantic & Pacific Tea, 395 Mich 244, 235 NW2d 732 (1975), in Riddle v McClouth Steel, 440 Mich 85, 485 NW2d 676 (1992), which cited Quinlivan with approval,⁵ and in Mann v Shusteric Enterprises, Inc., 470 Mich 320, 683 NW2d 573 (2004), where the Court stated:

"Thus, in the context of snow and ice, Lugo means that, when such an accumulation is open and obvious, a premises possessor must take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff] only if there is some special aspect that makes such accumulation unreasonably dangerous."

Mann 470 Mich at 332.

In Bertrand, Justice Weaver, concurring in part and dissenting in part, identified

⁴One example is a person who encounters a puddle that looks like water, but it is actually sulphuric acid. The condition is apparently quite obvious, but the risk of serious injury is not.

⁵In Quinlivan, the plaintiff slipped on ice in a parking lot (395 Mich at 247). This Court held that the possessor had a duty to exercise reasonable care in taking reasonable measures within a reasonable period to diminish the hazard. In Riddle, this Court reaffirmed the correctness of the Quinlivan holding with regard to the owner's obligation to a business invitee, "[a]s such duty pertains to ice and snow accumulations, it will require that reasonable measure be taken" (440 Mich at 93).

“hazardous natural conditions such as accumulation of snow and ice” as the quintessential paradigm in which liability may be imposed despite the so-called “open and obvious” nature of the condition. Bertrand, 449 Mich at 635-626.⁶

The accumulation of ice and snow would also seem to be situation that is particularly suited to the application of 2 Restatement of Torts, § 343A, which provides that:

“(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, **unless the possessor should anticipate the harm despite such knowledge or obviousness** .

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, **the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.**” (Emphasis added).

Clearly, an invitor should anticipate the harm that could result from its invitees falling in a parking lot that is completely covered with ice, as was the parking lot in this case. Further, because the Defendant in this case had notice that another individual has fallen several days prior to the Plaintiff, it had actual knowledge of the harm.

The dictum in Lugo that “unlike falling an extended distance, it cannot be expected that a typical person tripping . . . and falling to the ground would suffer severe injury,” and that “there

⁶To quote Justice Weaver:

“Cases finding that the risk of harm is unreasonable despite its obviousness or despite the invitee’s awareness of the condition are rare and typically involve hazardous natural conditions such as accumulations of snow and ice or excessive mud. The risk to the invitee in such condition has been held to be somehow more unavoidable than other conditions, thereby creating an exception to the open and obvious defense”.

In support of that conclusion, Justice Weaver cited Quinlivan v Great Atlantic & Pacific Tea, 395 Mich 244, 235 NW2d 732 (1975), among other cases.

is little risk of severe harm” , which many Court of Appeals cases have relied upon, was not supported by any evidence presented in that case. As discussed below, the likelihood of severe injury and death from falling to the ground from a standing position has been well documented.

A. Statistical Evidence Demonstrates that Falls Are Correlated with a High Likelihood of Serious Injury or Death.

Falls are the leading cause of nonfatal injuries that are treated in hospital emergency departments.⁷ Falls are the leading cause of injury related mortality among the elderly.⁸ Beginning at about age 70, the death rate from falls increases dramatically. By age 78, the rate of death from falls surpasses that for motor vehicle collisions, and the death rate continues to rise with increasing age.⁹ In 2001, there were 11, 623 deaths among persons aged 65 and older attributed to falls, which was 36% of all injury related deaths in that age group.¹⁰

Falls accounted for 31 % of all deaths from unintentional injuries in public places in 2003,¹¹ and were the second leading cause of unintentional injury or death overall in 2001.¹²

The problem is also longstanding. There were 12,077 injury deaths from falls in the

⁷According to data from the All Injury Program, a cooperative program involving the National Center for Injury Prevention and Control, the Centers for Disease Control, and the Consumer Product Safety Commission. National Safety Council, Injury Facts, 2004 Edition, p. 10.

⁸Id. p. 147.

⁹Id. p. 17.

¹⁰Id. p. 147.

¹¹ Id. p. 123.

¹²Id. p. 14.

United States in 1982, according to statistics from the National Center for Health Statistics.¹³

In a 1989 Report to Congress, falls were listed as the leading cause of nonfatal injury in the United States, accounting for 783,357 hospitalizations. Falls were also listed as accounting for 12,866 deaths.¹⁴

The above statistics are just a few examples of the information that is available that addresses the problem of serious injury and death resulting from ordinary falls. Falls are the second leading cause of traumatic brain injuries, after motor vehicle collisions, and account for 20-30% of all traumatic brain injuries.¹⁵ Several well known examples of individuals who died as a result of falling to the ground from a standing position are Dr. Robert Atkins, and Katherine Graham, the late owner and publisher of the Washington Post and Newsweek. Dr. Atkins whose death certificate lists the cause of death as “blunt impact injury of the head with epidural hematoma”¹⁶, sustained a traumatic brain injury after slipping on an icy Manhattan street. Katherine Graham died two days after she tripped and fell, causing her to lose consciousness.¹⁷

Traumatic brain injuries, such as the one suffered by the Plaintiff in this case, if not fatal,

¹³As quoted by the Committee on Trauma Research, Commission on Life Sciences, National Research Council, and the Institute of Medicine in Injury in America, A Continuing Public Health Problem, National Academy Press, (1985).

¹⁴Cost of Injury in the United States, A Report to Congress 1989, Produced by Institute of Health & Aging, University of California, San Francisco; Injury Prevention Center, School of Hygiene and Public Health, The Johns Hopkins University.

¹⁵ Segun T Dawodu, MD, FAAPMR, FAANEM, CIME, DipMI(RCSed), Traumatic Brain Injury: Definition, Epidemiology, Pathophysiology, July 2005, p. as reprinted in www.emedicine.com

¹⁶The death certificate is available at www.thesmokinggun.com/archive/bloombergatkins1.htm.

¹⁷As reported by William F. Buckley Jr., National Review Online, July 20, 2001.

require extended medical care and rehabilitation. The cost to the community of providing medical treatment to victims of pedestrian injuries resulting from slipping and falling is far greater than that of diminishing the hazard by undertaking measures to keep walking surfaces free from ice and snow.

This Court should make clear that it has never held as a matter of law that a typical person tripping and falling to the ground cannot be expected to suffer severe injury. The above statistics illustrate that serious injury and death frequently result from falls to the ground, regardless of the cause of the fall, whether by pothole, ice or some other reason.

Many Courts of Appeals panels have cited Joyce, and Corey, for the proposition that the danger presented by snow and ice is open and obvious, and have affirmed dismissal of the seriously injured persons' cases without consideration of whether despite the alleged open and obvious condition, there was an unreasonable risk created by encountering the danger. The lower courts are relying on dictum in Lugo, regarding the presumed lack of a high likelihood of injury from falls. Further, the lower courts are assuming that the only special aspects that may exist are the two examples given by this Court in Lugo.

As applied to situations involving a parking lot covered with ice, the probability of severe harm is arguably far greater than the probability of harm from encountering the 30 foot deep pit used as an example in the Lugo case. As the Court stated in Lugo, the 30 foot deep pit would be avoidable. On the other hand pedestrians encountering whole parking lots that are iced over, as occurred in this case, have no means to avoid encountering the hazard. The pedestrian does not have the means to protect him or herself from the hazard, even if it is open and obvious, because the pedestrian does not carry his or her own supply of salt and sand, and is required to

traverse the parking lot to go to the premises in question. If the pedestrian is an invitee, the harm should be anticipated by the invitor. 2 Restatement of Torts, § 343A.

This approach is consistent with the principles adopted by this Court in Riddle, when the Court held that there was no duty to warn of obvious conditions, yet “[i]f the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger.” Riddle, 440 Mich at 96-97.

Whether in a particular circumstance the danger from ice and snow is open and obvious, whether the possessor should anticipate the harm despite the obviousness, and whether the hazard presents an unreasonable risk of harm should be questions of fact for the jury. These issues should not be removed from jury consideration unless the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases. Moning v Alfonso, 400 Mich 425, 450, 683 NW2d 573 (1977).

There is no overriding public policy consideration that would support an effective grant of immunity from tort liability for injuries caused by an unreasonable risk of harm that the possessor of land should anticipate despite its obviousness. In situations involving ice and snow, the possessor of land is in the best position to diminish the hazard. Despite the arguable obviousness of pervasive ice in a parking lot, the invitee cannot protect him or herself against it.

While it may be arguable that the more pervasive the ice is, the more obvious it is, this also makes it a more dangerous and unavoidable hazard. Many invitees may be expected to visit a business establishment on a given day. Further, contrary to some Court of Appeals panels’ contentions that the invitee may avoid the risk by shopping elsewhere, there are many situations where the invitee is not at the invitor’s business for an optional reason such as shopping. One

example is the Plaintiff in this case, who was in the course of his employment.

B. The Danger Presented by a Particular Condition of Ice May Not Be Apparent Upon Casual Observation Because the Risk of Injury Depends on Many Specific Factors

The Defendant in this case relied on testimony of one witness who indicated that the ice was visible to him, and that much of the parking lot surface was covered with ice. The Trial Court concluded that “an average person would have discovered upon casual inspection that the parking lot was icy”, basing its finding on the testimony of Lynn LaVictor that the parking lot was “covered all with ice”, and on the testimony of the Plaintiff that there was snow and ice in Michigan all over at that time of year. (Transcript of Motion for Summary Disposition, pg. 46). The Court of Appeals similarly concluded that “there was no evidence to reasonably support a finding that the alleged icy condition of the parking lot at the time of the incident was not open and obvious.” Court of Appeals Opinion, No. 250384 (January 27, 2005).¹⁸

Contrary to common assumption, not all icy conditions are the same, nor do they all pose the same level of risk. A substantial body of scientific evidence exists which clearly demonstrates the varying risks posed by different situations. For example, the coefficient of friction between ice and footwear varies depending on the temperature, structure, and hardness of the ice.¹⁹ The ice coefficient of friction can be very small at high temperatures and high

¹⁸It should be noted that the Court of Appeals improperly assumed that the burden was upon the Plaintiff to refute the assumption that the danger posed by the icy condition of the parking lot was open and obvious. Because the Defendant had filed a Motion for Summary Disposition relying on the open and obvious doctrine to defeat Plaintiff’s claim, it was the Defendant who had the burden of coming forward with undisputed evidence in support of its contention that the danger was open and obvious. MCR 2.116(G)(3).

¹⁹ Measuring Slipperiness, Human Locomotion and Surface Factors, Editors: Wen-Ruey Chang & Theodore K. Courtney, Taylor & Francis (publishers) (2003), p. 127-128.

velocities, or very large at low temperatures and low velocities.²⁰ Measuring slipperiness and its causative relationship to slips and falls is a complicated matter, involving many scientific disciplines, including biomechanics, engineers, and human factors.²¹ While these principles may not be relevant in all cases, they do demonstrate that closer scrutiny must be given to each individual set of facts and circumstances.

Unfortunately in this case, as in other past decisions, the lower courts did not base its decision upon a fully developed record. This Court should be cognizant that in certain cases, the parties should be allowed to develop a full record that will address the principles of safety and human factors engineering.²² The scientific principles involved in human factors and safety engineering are much more complex than a reading of some of the lower court decisions would suggest. These scientific principles demonstrate that: 1) all icy conditions do not present the same hazard, 2) danger, hazard and risk are not interchangeable terms denoting the same conditions, and 3) risk recognition and risk acceptance are not simple perceptions applied uniformly by all.

Safety and human factors professionals use specific definitions for “hazard”, “risk” and

²⁰Id., quoting Petrenko, V.F. The Effect of Static Electric Fields on Ice Friction, Journal of Applied Physics, 76, 1216-1219.

²¹An international scientific symposium was held in an attempt to advance the study of slipperiness. Courtney, Theodore, Chang, W.R. and Redfern, Mark S., The Measurement of Slipperiness-An International Symposium, Ergonomics, (2001) Vol 44, No. 13, p. 1097; See also, English, William, CSP, PE, Slips, Trips and Falls, Safety Engineering Guidelines for the Prevention of Falling Accidents, (1989).

²²These disciplines are offered as fields of study at many universities and colleges such as UCLA, Georgia Tech and Brigham Young, which offer undergraduate and graduate programs in safety and human factors engineering. Numerous technical publications are devoted to the research, study, and analysis of slip and fall hazards, as well as the development of recognized safety concepts in premises design and maintenance to reduce the risk of slips and falls in particular circumstances. See e.g., Measuring Slipperiness, Human Locomotion and Surface Factors, Editors: Wen-Ruey Chang & Theodore K. Courtney (2003); Ergonomics Society and International Ergonomics Association, Ergonomics, An International Journal of Research and Practice in Human Factors and Ergonomics; William English, CSP, PE, Slips, Trips and Falls, Safety Engineering Guidelines for the Prevention of Falling Accidents (1989); Aaron Goldsmith, PE, Natural Walking, Unnatural Falls, Safety & Health, December 1988.

“danger”, which are often mistakenly used interchangeably by the courts. Safety professionals define hazard as a condition or changing set of circumstances that present a potential for injury.²³ Risk is defined as a measure of the probability and consequences of encountering a particular hazard.²⁴ Danger is defined as the unreasonable combination of the hazard and the risk.²⁵

In this case, both the Trial Court and the Court of Appeals assumed that the ice (the hazard) was the danger, when in fact, using safety and human factors engineering principles, the danger in this case is more properly defined as the combination of :

1) the hazard posed by the amount of kinetic friction²⁶ or lack thereof, that was encountered by walking on the particular parking lot material that existed in this case, in the presence of ice of a particular consistency and thickness, when that surface was encountered by a walker of Plaintiff's size and walking gait, wearing the particular footwear material that was used by the Plaintiff, taking into account the interacting environmental and human factors involved, including the topography, surface roughness, lighting and contrast levels, the tread and wear of

²³American Society of Safety Engineers, The Dictionary of Terms Used in the Safety Profession, (3rd ed 1988), p. 26.

²⁴Id. at 49.

²⁵See e.g. Charles Blixt, Caterpillar Tractor Co, "The Role of the Engineer in Product Liability Litigation", Society of Automotive Engineers, Paper No. 84-1052 (1984).

²⁶Friction is the force that opposes the relative motion or tendency of such motion of two surfaces in contact. The coefficient of friction is a value which describes the ratio of the force of friction between two bodies and the force pressing them together. For example, ice on metal has a low coefficient of friction (they slide past each other easily), while rubber on pavement has a high coefficient of friction (they do not slide past each other easily). Wikipedia, <http://en.wikipedia.org>. The standard formula for friction is the relationship between the resistive force of sliding friction for hard surfaces, the normal force pushing the two surfaces together and the coefficient of friction number for the two surfaces. See Ron Kurtus, Standard Friction Equation, The School for Champions website, www.school-for-champions.com/science/friction_equation.htm. The formula is expressed as $F_r = \mu * N$, where F_r is the resistive force of friction, μ is the coefficient of friction for the two surfaces, and N is the normal or perpendicular force pushing the two objects together. Id.

The friction formula applies to both static and kinetic friction. Kinetic friction is the friction involved in moving or sliding. Id. Kinetic friction depends on several factors including the material properties of the two surfaces (the parking lot paving material and the material used for the sole of the footwear of the walker), the force of contact, and the macroscopic and microscopic shape of the two surfaces, i.e. the roughness of the two surfaces at the point of contact. Id. See also Wikipedia, http://en.wikipedia.org/wiki/Traction_%28engineering%29; Glenn Elert, The Physics Hypertextbook, (1998-2005), <http://hypertextbook.com/physics/mchanics/friction>.

the Plaintiff's footwear, and the Plaintiff's sensory systems, i.e. vision, proprioception, and somatosensation.²⁷

and

2) the risk involved, which is a measure of the probability and consequences of encountering the particular hazard involved in this case, i.e. the probability that an individual who is using the parking lot that day would encounter the icy conditions in such a manner as to cause one to slip and fall, and the probable nature and severity of injury if one does fall.

Similarly, risk recognition and risk acceptance are complicated concepts which are the subject of scientific study. Risk recognition refers to the ability of one affected by the risk to recognize the degree of risk.²⁸ The variables bearing on one's ability to recognize the hazard and appreciate the risk include: education, experience, training, the environment, sound, light, attention diverting circumstances, competing tasks, physical ability, scientific laws, notice and time given for risk recognition.²⁹ Risk acceptance is the process of making an adequate and competent assessment of the degree of the hazard and amount of the risk, to make a correct judgment of the chance of and probable severity of injury, and then to determine the possible courses of action based on calculation of the degree and chances of success or failure.³⁰

Amicus Curiae is aware that this Court has previously held that an objective standard

²⁷Measuring Slipperiness, Human Locomotion and Surface Factors, Editors: Wen-Ruey Chang & Theodore K. Courtney, Taylor & Francis (publishers) (2003), p. 38,

²⁸ Philo, John C, and Whitaker, David D, The Myth of Open and Obvious Danger, MTLA Quarterly, Vol 35, No. 4, p. 22.

²⁹Id.

³⁰Id., referring to risk recognition and risk acceptance flow charts used by safety professionals, which are reprinted in the article. These charts reflect well established, long standing safety engineering principles based upon solid scientific research, including, for example, Rockwell, TH & Burner, LR, "Information Seeking in Risk Acceptance", ASSE Journal, February 1968, pp. 6-10, Rockwell, TH, "Some Exploratory Research on Risk Acceptance in a Man-Machine Setting", ASSE Journal, December 1962, pp 23-29.

should be used to determine whether a particular danger is open and obvious. However, the objective standard needs to take into account the actual circumstances of the particular hazard, i.e. the icy condition, including its pervasiveness, visibility, the temperature, the type of ice, the coefficient of friction created when walking on the ice, and the other variables stated above, all of which may have a bearing on whether the particular danger presented in that case was open and obvious, and all of which are factual determinations that should be decided by the jury.

Amicus Curiae does not take a position on whether the danger in this case was open and obvious. There are too many unknown facts that cannot be ascertained based on the record developed in the lower court. Whether the recognition of the specific danger presented under the circumstances, as opposed to the general hazard of ice, would have been discovered upon casual inspection by an average person with ordinary intelligence should not be answered by the courts without taking into account established scientific principles.

II. A Possessor of Land's Failure to Undertake Measures to Diminish the Risk May Constitute a Special Aspect

The Court asked the parties to address whether the Defendant's failure to undertake measures to diminish the alleged risk in and of itself constituted a special aspect under Lugo v. Ameritech Corp., 464 Mich 512, 629 NW2d 384 (2001). Amicus Curiae contends that a failure to undertake measures to diminish the risk should be one of the factors that the Court looks at to determine if there are genuine issues of fact regarding the presence of special aspects in a particular case.

In Lugo, this court held that if special aspects of a condition make an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable

precautions to protect invitees from that risk. Lugo, 464 Mich 512, 517. (Emphasis added). The court provided the example of a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. “In other words, the open and obvious condition is effectively unavoidable.” Id. at 518. In that example, a duty would arise to undertake reasonable precautions to protect the invitee from the risk of walking through the standing water. The specific conduct required to fulfill that duty, would be for the jury to decide. Moning v. Alfano, 400 Mich. 425, 254 N.W.2d 759 (1977).

Similarly in cases involving a parking lot covered by ice, as was the testimony in the present case, the condition is effectively unavoidable, and also unreasonably dangerous because the probability of harm is great if the entire parking lot is covered with ice. Any invitee parking who parks in the lot must walk to get from his/her vehicle to the business establishment. A duty would arise to undertake reasonable precautions to protect the invitee from the risk of walking on the ice covered parking lot.

With respect to whether the Defendant’s failure to undertake measures to diminish the risk should in and of itself be considered a special aspect, the case of Mann v. Shusteric Enterprises, Inc., 470 Mich 320, 683 NW2d 573 (2004), is instructive. In that case, this Court reiterated that under Lugo, a premises possessor still has a duty to “protect” an invitee from dangers that are either not open and obvious, or although open and obvious contain special aspects that make such dangers unreasonably dangerous. Mann, 470 Mich at 331. This Court explained that as that term was used in Lugo, the “duty to protect” is broader and more general than either a duty to warn or a duty to diminish a hazard caused by ice and snow and that the

“duty to protect” encompasses both. The Court further stated:

“in the context of an accumulation of snow and ice, Lugo means that, when such an accumulation is ‘open and obvious’, a premises possessor must ‘take **reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff]**’ only if there is some ‘special aspect’ that makes such accumulation ‘unreasonably dangerous’.”

Mann, 470 Mich at 332, (emphasis added).

Thus the duty to protect includes a duty to diminish the hazard, when ignoring the accumulation would cause an unreasonably dangerous condition. This Court in Mann has reaffirmed the reasoning in Quinlivan, that an invitor’s duties include the duty to diminish the accumulation of ice and snow within a reasonable time if a special aspect makes such accumulation unreasonably dangerous. Contrary to statements made in some Court of Appeals cases, this Court has never held that Quinlivan has been subsumed by Lugo.

In the present case, reasonable persons could conclude that special aspects did exist based on Defendant’s failure to have any salt available to its employee to use, despite Defendant’s actual knowledge of the hazard because the employee complained that he was out of salt and had resorted to using table salt to attempt to diminish the hazard.

Reasonable minds could also conclude that on the date in question, because the parking lot was completely iced over, this was a special aspect that made the condition unreasonably dangerous, and required action on the Defendant’s part. The Defendant’s failure to take measures within a reasonable time prior to its expecting the Plaintiff’s planned visit, when Defendant’s employee knew the parking lot needed icing, constitutes a special aspect.

Mr. LaVictor testified that salting the parking lot was always done in the morning around

6:30 or 6:45 a.m. (Dep of Mr. LaVictor, p. 19), but that the morning of the Plaintiff's fall, he could not salt the parking lot because he was out of salt (Id., p. 20). Mr. LaVictor believed that the parking lot required salting on the date of Plaintiff's fall. (Id. 20-21) The day before the Plaintiff's fall, it had been warm and the ice that had been melted by the prior salting froze again during the evening prior to the Plaintiff's fall. (Id, p. 20-21). The Defendant's snow removal contractor would routinely pile snow from plowing in a location where it would form a snow bank near the building and would melt onto the parking lot, causing the parking lot to ice over. (Id. p. 21-24). Mr. LaVictor had previously informed his supervisors that he was out of salt and that it was needed. (Id. 24-26). Another person had previously slipped and fallen in the lot on the Sunday before Plaintiff's fall because of the lack of salt. (Id. 54).

This case illustrates an example where a defendant's conduct itself may have created an unreasonably dangerous condition. The unreasonably dangerous condition that Plaintiff encountered was not caused by a natural accumulation of ice or snow but by Defendant's prior negligent conduct, which created the hazard or increased the hazard. The Defendant allowed a snow removal company to pile snow it had plowed from the parking lot in a location where it was melting and causing icy conditions in the lot. Further, the Defendant had previously used salt on a regular basis, and a reasonable jury may conclude that failing to continue to use the salt, after Defendant had used salt to cause the snow to melt, was a special aspect that rendered the condition unreasonably dangerous. Mr. LaVictor's testimony was that the salt would melt the ice and then it would re-freeze again during the night when temperatures dropped, only to melt again during the day.

Further, as the Plaintiff had frequented Defendant's premises on a regular basis, the jury

could conclude that the Plaintiff's reasonable expectation that Defendant would use salt to diminish the hazard was a special aspect that rendered the situation unreasonably dangerous when the Defendant failed to use salt in the days prior to Plaintiff's fall.

The Court of Appeals correctly found that “ a reasonable person could conclude that the situation involved special aspects that rendered the open and obvious danger posed by the ice unreasonably dangerous”. Court of Appeals Opinion, p. 2. The Court of Appeals concluded there were special aspects based on the unavailability of the condition itself as well as on the Defendant's knowledge of the icy condition and its failure to respond to it within a reasonable time. Id. 2-3.

There is no reason why this court should limit the special aspects analysis to the condition of the icy parking lot itself. The entire situation may be considered a special aspect, including the Defendant's knowledge of the icy condition, Defendant's prior conduct in salting the parking lot, and allowing the piling of melting snow banks in the vicinity of the parking lot, as well as Defendant's failure to provide ice to Mr. LaVictor despite repeated requests.

In Bertrand v. Allen Ford, 449 Mich 606, 537 NW 2d 185 (1995) this Court reasoned that although the danger of falling down ordinary steps may be open and obvious, an unreasonably dangerous situation may still exist based on the conduct of the defendant in placing vending machines next to the steps in question, in the proximity of a cashier's window. Bertrand, 449 Mich 606, 624.

Likewise, in this case, the Defendant's conduct should be considered in determining whether special aspects rendered the entire situation unreasonably dangerous. Various Court of Appeals cases have already applied a similar analysis against the plaintiff by focusing on a

plaintiff's conduct in concluding that there were no special aspects.

For example, in Buckenmeyer V. Office Max, Inc. No. 242953, (October 21, 2003), the court found that even if there was no safe path to the entrance of the store, the plaintiff was not forced to encounter the hazard because she should have shopped on a different day. In McFarlin v. Ross Props, No. 242416, (December 2, 2003), the court opined that the plaintiff should have postponed a social visit, after discovering the slippery and potentially dangerous character of the parking lot.

In Slater v. Marvin Brandle, No. 260867 (June 23, 2005), the plaintiff fell on ice in front of the only entrance to the building, when the area was unlit and dark, and he did not see the ice before his fall due to the darkness. After he fell he turned on a light inside the building and saw the layer of ice in front of the door. The Court found that because the plaintiff knew from prior visits that the building had a drainage problem above the door, he should have known that icing was possible, and concluded that the danger was open and obvious.

Fairness dictates that if the plaintiff's conduct will be used in a special aspects analysis, then a defendant's conduct should be used in a similar fashion.

III. To Prevail on a Motion for Summary Disposition Premised on the Open and Obvious Doctrine, The Defendant Should Have the Burden of Proving that No Special Aspects Exist

The burden of proof should be placed on a defendant to show that a danger was open and obvious, and that there are no special aspects which render the risk unreasonably dangerous.

The open and obvious doctrine attacks the duty element of a negligence case. Riddle v. McClouth Steel Products, 440 Mich 85, 485 NW2d 676 (1992). It is not viewed as an exception to the duty generally owed invitees, but rather as an integral part of the definition of that duty.

Lugo v. Ameritech Corp, Inc, 464 Mich , 512, 516; 629 N.W.2d 384 (2001). This Court

summarized the doctrine as follows:

“In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.”

Lugo, 464 Mich at 518.

It is clear that the special aspects analysis is part and parcel of the duty analysis because this Court has held that the duty is imposed only if special aspects make the open and obvious condition unreasonably dangerous. A defendant who is seeking to avoid liability pursuant to the open and obvious doctrine is essentially arguing that the circumstances of the specific situation do not give rise to a duty to protect the invitee from the danger involved.

An inseparable and necessary part of that analysis involves determining if the hazard, in combination with the risk (the probability and consequences of encountering the hazard) “remains unreasonable . . . such that the invitor is required to undertake reasonable precautions”, Lugo, at 517, to protect the invitee. Stated another way, this Court has held that “if special aspects of a condition make even an open and obvious risk³¹ [hazard] unreasonably dangerous”, the risk remains unreasonable, triggering a duty to protect invitees from the danger. Lugo, 464 Mich at 386.

If there are questions of fact regarding whether the risk remains unreasonable, the issue of the existence of duty as well as the breach of duty become questions for the jury to decide, as this Court held in Bertrand v. Allen Ford, 449 Mich 606, 617, 537 NW2d 185 (1995). Because the special aspects analysis is an integral part of determining whether or not a defendant is excused

³¹Amicus Curiae would argue that the more accurate term here would be “hazard” for the reasons discussed in Argument IB.

from the general duty owed an invitee, the burden of proof at trial should be on the defendant to show that no special aspects were presented by the situation, in conjunction with the defendant's argument that the open and obvious doctrine bars the imposition of a duty. Placing the burden of proof on the defendant is consistent with Michigan's longstanding policy of requiring a party that seeks to defeat the claim of the other to bear the burden of proving the factual and legal basis which bars the claim.³²

In situations like the present case, where a defendant has moved for summary disposition pursuant to MCR 2.116(C)(10)³³, it is axiomatic that the defendant would have the burden of showing that there are no genuine issues as to any material fact, and that the defendant is entitled to summary judgment as a matter of law because no reasonable persons could disagree as to whether the risk remained unreasonable, despite its alleged openness and obviousness. MCR 2.116(G) mandates that the defendant produce evidence which would be admissible at trial to establish the grounds for the motion. Of necessity, the grounds for the motion would include a contention that no reasonable persons could disagree that there were no special aspects, and thus that there was no basis to impose a duty on the defendant. Therefore, the defendant would have the burden of proof that there were no genuine issues of material fact regarding the absence of special aspects.

CONCLUSION


Amicus Curiae Michigan Trial Lawyers Association respectfully request that this

³²The issue of openness or obviousness first arose as the affirmative defense of contributory negligence. Bertrand v. Allen Ford, 449 Mich at 614. The burden of proof on the issue of contributory negligence was placed on the defendant. Knickerbocker v Samson, 364 Mich. 439; 111 NW2d 113 (1961).

³³Summary disposition pursuant to MCR 2.116(C)(10) is proper only when the trial court is able to determine as a matter of law that the moving party is entitled to judgment. Johnson v Auto-Owners Insurance Company, 138 Mich App 813; 360 NW2d 310 (1984).

Honorable Court adopt the legal principles suggested in this Amicus Brief.

Respectfully submitted,


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